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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 1986 TERM

ROBERT WESLEY DERVISHIAN,

Petitioner,

v.

COMMONWEALTH OF VIRGINIA

Respondent.

BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

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1987

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QUESTIONS PRESENTED FOR REVIEW

(1) Did the trial court properly afford petitioner herein an opportunity to call for evidence in his favor?

(2) Did the trial court act in a neutral and detached manner, providing petitioner herein due process of law?

(3) Were the convictions of

petitioner herein based upon evidence sufficient to support them?

STATEMENT OF FACTS

At approximately 2:00 a.m., on the morning of May 31, 1984, within the City of Richmond, Virginia, Joe Ramirez, a member of the Richmond Bureau of Police (hereinafter referred to as "Ramirez"), observed an automobile travelling west on Floyd Avenue make a right turn onto Sheppard Street going north; Sheppard Street is a one-way street southbound. When he made that observation, Ramirez was travelling south on Sheppard Street in his marked police vehicle. Ramirez turned and began following the vehicle that was going the wrong way on a one-way street. Several turns and blocks later, the automobile in question went through a red light. At that point, Ramirez turned on the emergency red



lights on his police car and the automobile pulled over to the curb.

When Ramirez exited his police car, the driver of the automobile, who was petitioner herein, was exiting the stopped vehicle. Ramirez approached him and asked petitioner for his driver's license and registration card. Ramirez noticed a "moderate odor of alcohol" and that petitioner's eyes were "glassy and a little bloodshot."

When asked if he would perform a field sobriety test, petitioner nodded his head affirmatively. Ramirez asked petitioner to "walk a line" and then, upon command, to turn around. Petitioner proceeded to walk the line; when Ramirez directed him to turn around, there was a four feet tall brick wall "right next to [petitioner]." Upon turning around pursuant to Ramirez's direction, petitioner "stumbled," "grabbed hold of



the wall" and looking at Ramirez, stated, "I refuse to take any further tests."

When asked what he had to drink, petitioner responded that he had "a few drinks, was not intoxicated" and he refused to take any further tests. Even after being advised by both Ramirez and a magistrate of his rights and the provisions of the Virginia Implied Consent Law, petitioner refused to submit to a breath or blood test to determine his bodily alcohol content. His continued refusal to submit to either test formed the basis for his being charged with refusing to take a blood or breath test.

Petitioner was tried and was found guilty of both Driving under the Influence and Refusing to Take a Blood or Breath Test in the Richmond General District Court, Traffic Division (hereinafter referred to as "Traffic Court"); he appealed those convictions to the Circuit



Court of the City of Richmond (hereinafter referred to as "Circuit Court").

It is petitioner's subsequent conviction in the Circuit Court on both charges which forms the basis for this appellate action.

In the Circuit Court trial, petitioner sought the identity of two persons who were released from the lockup when he was released; he claimed that testimony from these two unknown individuals would benefit his defense. Petitioner also sought a tape recording and/or transcript of said recording which was made during his trial in Traffic Court; he claimed that the recording would be useful in impeaching the testimony of Officer Ramirez. Initially, the Circuit Court judge denied both requests, but after petitioner was found guilty, the trial judge set aside the convictions, to enable petitioner to



obtain the requested information and evidence.

Fifty days later, on October 9, 1984, the trial judge resumed the trial, at which time he asked petitioner, "Did you get everything you wanted, Mr. Dervishian?" The response from petitioner: "Yes, sir, Your Honor." The trial court accepted a transcript of the original Traffic Court trial. At the conclusion of the October 9, 1984, hearing, the trial judge again found petitioner guilty on both charges. It is from those convictions that petitioner appeals.

ARGUMENT

Under applicable Virginia law, any person convicted in Traffic Court has a right to appeal that conviction to the Circuit Court; that appeal is heard de novo in the Circuit Court. See Sections 16.1-132 and 16.1-136 of the Code of



Virginia (1950), as amended. This procedure was initiated to fulfill the constitutionally protected guarantee of a right to trial by jury, since Virginia law does not provide for jury trials in Traffic Court. The effect of Section 16.1-136 is to provide a statutory grant of a new trial to petitioner to be had before a court of record having original criminal jurisdiction, and to annul the judgment of the Traffic Court as completely as if there had been no previous trial. See Evans v. Richmond and Commonwealth, 210 Va. 403, 407, 171 S.E. 2d 247 (1969), citing Gaskill v. Commonwealth, 206 Va. 486, 144 S.E. 2d 293 (1965). Consequently, any complaints petitioner may have about the conduct of his trial in Traffic Court are moot.

Likewise, petitioner's complaint of increased penalty imposed in the Circuit Court is without merit. The de novo



procedure followed "remedies" the problem(s) noted in North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2073, 23 L.Ed. 2d 656 (1969). See Evans v. Richmond and Commonwealth, supra. at 407.

Petitioner's next complaint is that he was prohibited by the Circuit Court from obtaining witnesses and/or evidence in his behalf. Even a casual reading of the transcript of his trial refutes those claims.

At the outset of his Circuit Court trial, petitioner wanted the court to order production of the tape of the Traffic Court trial. The judge denied petitioner's motion, but added, "Well, if they become necessary, I [will order production]," and shortly thereafter added, "If I find it necessary I will listen to the traffic court tapes." At the conclusion of the prosecution's case, petitioner stated that he wanted to call



as his witnesses "those [two] persons that were released [from the lockup] at the same time [as petitioner was released after having been given an opportunity to wear off the effect of his alcohol intake]."

At that point, the trial court took the matter under advisement, giving petitioner time to obtain the information he sought. The August 20 hearing was continued until September 12, 1984. On that date, the matter was set aside and continued until October 9, 1984. On that date, petitioner, in response to the judge's question, "Mr. Dervishian, are you prepared for your defense?" replied, "Yes." The judge then asked petitioner, "Did you get everything you wanted, Mr. Dervishian?" to which petitioner replied, "Yes, sir, Your Honor." Petitioner then proffered and the court accepted into evidence a transcript of the earlier Traffic Court trial. Petitioner called



no witnesses to testify on his behalf and he did not testify.

The judge of the Circuit Court found petitioner guilty of both offenses and imposed punishment, of which he suspended the execution when petitioner noted his appeal and posted an appeal bond.

Petitioner is hard pressed to claim error in alleging that he was not allowed to present evidence to the trial court when the record clearly shows not only did the trial court receive that evidence, but also postponed the defense portion of petitioner's trial for some fifty days to enable petitioner to obtain possession of the evidence in question.

Likewise, petitioner is also hard pressed to claim error in alleging that the trial court interfered with his procuring witnesses to testify in his



behalf when the witnesses he desires to call in a drunk driving and refusal case are two people who were released from the lockup the same time as petitioner was released. Those persons were not present at the scene of the drunk driving and nowhere has petitioner alleged that they were present when he later refused on numerous occasions to take either the breath or blood test. No proffer was ever made of their anticipated testimony in the Circuit Court. On October 9, 1984, petitioner told the trial court that he had all of the information he had sought, which presumably included the names of the two witnesses. When he failed/refused to call them as witnesses, or ask for a further continuance to obtain their presence at trial, he closed the door to any further allegations of error in their regard.

Petitioner's final complaint is



that the evidence was insufficient to support his convictions.

As to the refusal case, the evidence was abundant that he was advised of his rights and duty to take one of the two tests. He refused, but never told either the officer or the magistrate why he refused. Nor did he testify as to the basis of his refusal at his trial. A naked refusal without explanation can only be regarded as unreasonable. The sufficiency of that conviction can hardly be in question.

As to the drunk driving case, the evidence clearly shows that petitioner drove a vehicle the wrong way on a one-way street, went through a red light, displayed a moderate odor of alcohol when he exited his automobile, displayed eyes that were glassy and a little bloodshot, stumbled when he turned around after walking at Officer Ramirez's direction, grabbed



hold of the wall and told Officer Ramirez that he had had a few drinks.

The issue of sufficiency of the evidence is clearly one of state law, and under applicable Virginia law, both the Intermediate Court of Appeals and the Supreme Court of Virginia have ruled the evidence to be sufficient. Clearly, the evidence heard by the Circuit Court was sufficient to justify a rational trier of fact in finding guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed. 2d 560 (1979).

Finally, Rule 17.1 of this Court sets forth the character of reasons that will be considered by this Court in deciding whether to grant certiorari. Paragraph (a), dealing with a decision of a federal court of appeals is not applicable, since this case deals with a decision of the highest court of a state.



Paragraph (b) deals with a state court which has decided a federal question in such a way to conflict with other similarly situated courts. No such federal question is either presented or decided in this case. Likewise, Paragraph (c) deals with a state court deciding an important question of federal law which has not, but should be, settled by this Court. No such question of federal law has been presented or decided in this case.

CONCLUSION

Since there has been no violation of any right guaranteed by the United States Constitution, and none of the criteria in Rule 17.1 of this Court have manifested themselves in this case, the Petition for a Writ of Certiorari should be denied.



Respectfully submitted,
COMMONWEALTH OF VIRGINIA

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CERTIFICATE OF SERVICE

I hereby certify that forty true copies of the foregoing Brief in Opposition to Petition for a Writ of Certiorari were mailed to the Clerk's Office of the Supreme Court of the United States, and that three true copies of the same document were mailed, all postage prepaid, to Robert Wesley Dervishian, Esquire, 600 North Boulevard, Richmond, Virginia 23220, on this 3rd day of December, 1986.

Stacy F. Garrett, III